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BEFORE THE
Federal Communications Commission

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

The Implementation of
Section 309(j) of the
Communications Act

Competitive Bidding

PP Docket No. 93-253

To: The Commission

COMMENTS OF GEORGE E. MURRAY

GEORGE E. MURRAY

By Carl W. Northrop
Bryan Cave
Suite 700
700 13th Street, N.W.
Washington, D.C. 20005
(202) 508-6000

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SUMMARY

George E. Murray, a black entrepreneur with substantial telecommunications experience, is filing comments in support of the use of preferences in the competitive bidding process to foster the meaningful participation of minority-owned businesses in the provision of Personal Communications Services.

The comments demonstrate that the Commission has ample authority to accord competitive bidding preferences to minority applicants within previous guidelines established by the Supreme Court. In this instance, set-asides and other preferences will meaningfully advance a legitimate government purpose.

For a variety of reasons, the Commission should accord the most favored treatment to minority-owned businesses. Otherwise, there is a significant risk that all set-aside licenses will be garnered solely by entities controlled by women, small businesses and rural telephone companies, to the exclusion of minority-owned businesses.

Preferences should not be limited to the set-aside blocks of broadband PCS spectrum. Rather, the Commission must adopt rules for the non-set-aside bands that will encourage major industry participants to form strategic alliances with minority businesses. Such incentives, if added to the broad array of preference mechanisms proposed for the set-aside bands, will help achieve the legislative mandate of insuring the meaningful participation of minority-owned businesses in the provision of spectrum-based services.

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21 47 U.S.C. § 309(j)(4)(D).

the impediments which either foreclose or limit economic opportunities for minority-owned enterprises. Mr. Murray has witnessed firsthand many of the barriers to market entry and success cited by the Small Business Advisory Committee ("SBAC") in its comments in the personal communications services ("PCS") proceeding.^{3/} The purpose of these comments is to assist the Commission in fashioning an auction procedure to govern broadband PCS services that will achieve the congressional mandate of ensuring that businesses owned by members of minority groups are given the opportunity to participate in the provision of spectrum-based services. In furtherance of this purpose, the following is respectfully shown.

I. Preliminary Statement

1. George E. Murray is a self-employed, black entrepreneur with a business^{4/} and financial background.^{5/} From

^{3/} See Report of the FCC Small Business Advisory Committee to the Federal Communications Commission Regarding GEN Docket No. 90-314, submitted September 15, 1993 (the "SBAC Report").

^{4/} In 1970, Mr. Murray received a Bachelors of Science degree with a major in Business Administration from Central Missouri State. He went on to earn a Masters of Business Administration degree at the University of Missouri in Kansas City in 1972.

^{5/} Following graduate school, Mr Murray worked as an auditor for the accounting firm of Peat, Marwick & Mitchell in Minneapolis, Minnesota from 1972 through 1975. He then secured a position as a financial analyst in telecommunications matters with the Booker T. Washington Foundation in Washington, D.C., a position he held until (continued...)

1979 through 1984, Mr. Murray was in Government service, first as a financial analyst in the U.S. Department of Commerce,^{6/} and then as the Acting Deputy Assistant Secretary of the Economic Development Administration of the Commerce Department.^{7/} Mr. Murray then entered the private sector, and has since been engaged in a series of successful business ventures.^{8/}

2. Most important, in connection with these comments, is Mr. Murray's substantial telecommunications experience. His introduction to the communications industry came as a financial analyst in telecommunications matters for a well-known non-profit institution.^{9/} This background caused Mr. Murray to pursue communications licenses whenever opportunities presented themselves. A company owned and controlled by Mr. Murray became the Block A cellular licensee for the New London/Norwich, Connecticut market. Mr. Murray also has participated in varying degrees in cellular ventures involving the Asheville, North

^{5/}(...continued)

1979. This was the beginning of Mr. Murray's focused interest in the telecommunications industry.

^{6/} Mr. Murray held this position from 1979 through 1982.

^{7/} Mr. Murray held this position from 1983 through 1984.

^{8/} Mr. Murray is the owner of G.E. Murray & Associates, which operates several successful Midas Muffler franchises in Prince George's County, Maryland. He also is the owner of GEMCO, a real estate holding company.

^{9/} Mr. Murray worked for the Cable Research Center of the Booker T. Washington Foundation in Washington, D.C. The mission of the Center was to help minority businesses to become involved in the cable television business.

Carolina, Benton Harbor, Michigan, Kalamazoo, Michigan and McAllen, Texas markets.

3. Mr. Murray holds substantial interests in multichannel, multipoint distribution service (MMDS) licenses. He owns a 50% interest in licenses for Natchitoches, Louisiana and Meridian, Mississippi, and is a one-third owner of a license for Des Moines, Iowa. He also holds various minority interests in six other MMDS licenses. In addition, Mr. Murray was an applicant for the third designated 900 MHz nationwide paging license, and participated as an interestholder pursuant to the overall settlement of that licensing proceeding.

4. Mr. Murray's involvement in telecommunications ventures serves to confirm the problems faced by minorities as documented in the SBAC Report. For example, Mr. Murray would have liked nothing better than to continue to own and operate the New London/Norwich cellular system. However, the trend toward the concentration of ownership in the cellular business made the operation of the New London/Norwich facility on a stand-alone basis impractical and uneconomic. Moreover, continual financial obstacles confronted Mr. Murray, a minority new market entrant requiring substantial capital resources well beyond the licensee assets available for use as collateral. Ultimately, prudent business judgment necessitated the divestiture of the cellular license.

5. Based upon the financial success of his previous ventures, Mr. Murray is now in a position to invest substantial

capital in the establishment of a PCS business.^{10/} However, the advent of auctions for scarce spectrum creates the specter of an allocation scheme that will only serve to further entrench long established communications companies with the deepest pockets. If the concentration of ownership is allowed to continue, Mr. Murray will be deprived of any real economic opportunity in the PCS business, notwithstanding his relevant experience and wherewithal.

**II. The Commission Has Ample
Authority to Accord Competitive Bidding
Preferences to Minority Applicants**

6. As a threshold matter, the Notice requests specific comment on how the Commission may satisfy the legal standard set forth in relevant case law to support a benign race or gender-conscious classification.^{11/} While the Commission is wise to assure the development of an adequate legal record to support the legislatively sanctioned preferences, in the circumstances at hand the applicable standards are easily met.

7. Supreme Court precedent establishes that the Equal Protection Clause does not prohibit the government from treating people differently based on race, gender, or any other

^{10/} Mr. Murray also has developed business associations with other successful black entrepreneurs interested in participating in the PCS business.

^{11/} Notice at paragraph 73. As a general matter, racial preferences adopted by the government must be demonstrated to serve important governmental objectives, and the preferential measures must be substantially related to the specified goal. Id.

classification that furthers a legitimate government purpose.^{12/} When a program employing a benign racial classification is adopted by an administrative agency at the explicit direction of Congress, the Supreme Court considers the classification "with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide' for the general Welfare of the United States, and 'to enforce, by appropriate legislation', the equal protection guarantees of the Fourteenth Amendment."^{13/}

8. Minority preferences in competitive bidding for telecommunications licenses advance an important and worthwhile objective. The Congressional intent expressed in the Budget Act, now codified in Section 309(j)(3)(B) of the Communications Act, is to "promote economic opportunity and competition", and to avoid excessive concentration of licenses. The Supreme Court decision in Fullilove v. Klutznick^{14/} indicates that these Congressional objectives are adequate. Fullilove held that to "achieve the goal of equality of economic opportunity", the Congress had "necessary latitude to try new techniques such as

^{12/} See Samuel L. Starks, Understanding Government Affirmative Action and Metro Broadcasting, Inc. v. FCC, 41 Duke L. J. 933, 947 (1992).

^{13/} Metro Broadcasting, Inc. v. FCC, 547 U.S. 547, 563 (1990), citing Chief Justice Burger in Fullilove v. Klutznick, 448 U.S. 448, 472 (1979).

^{14/} Supra at note 13.

the limited use of racial and ethnic criteria to accomplish remedial objectives...."^{15/}

9. Historical barriers to minorities in the telecommunications industries, and current financing barriers, have been amply documented in the SBAC Report.^{16/} Thus, Congress clearly is correct in its finding that action is necessary to create true economic opportunity for minority business within the communications sector.^{17/} This governmental interest is especially persuasive since the preference is being used to allocate a public resource that all Americans should have an equal opportunity to utilize.

10. There also can be no doubt that competitive bidding preferences provide an appropriate means to accomplish the stated objectives. The SBAC Report contains specific

^{15/} Fullilove, 448 U.S. at 487. The Court upheld a provision of the Public Works Employment Act of 1977 that required 10% of federal funds granted for local public works projects to be used by the state or local grantee to procure services or supplies from minority groups.

^{16/} See SBAC Report at pp. 2-6.

^{17/} Congress also held a series of hearings related to the telecommunications provisions included in the Budget Act, including an oversight hearing by the Subcommittee on Telecommunications and Finance on April 22, 1993 and a hearing on February 4, 1993 regarding Chapter 2 of the Act. Also, during the 102nd Congress, the Subcommittee held hearings on spectrum auction and allocation proposals. Moreover, Congress is entitled to rely upon information and expertise acquired in the consideration and enactment of earlier legislation. Fullilove, 448 U.S. at 502-03. Notably, Congress has considerable experience with legislation that employs set-asides to foster minority and small business participation in government auctions. See SBAC Report at p. 8.

findings regarding the manner in which preferences will serve to promote opportunities for minority-owned businesses to participate in the provision of spectrum-based services.^{18/} And, the legislation calls for the Commission to consider safeguards to avoid speculation and profiteering that would undermine the accomplishment of the specified aims.

11. In sum, the Commission may proceed to adopt a broad array of preferential measures with confidence that its actions will be upheld.

III. Minority Businesses Are Deserving of Particularly Favorable Treatment

12. The Notice acknowledges that the auction statute does not require that every category of the designated preference entities (the "Designated Entities") be afforded the same type of beneficial treatment.^{19/} For a variety of reasons, the Commission should accord the most favored treatment to minority-owned businesses.

13. The SBAC Report demonstrates that businesses owned by minorities face unusually severe hurdles.^{20/} While attracting capital is difficult for many small businesses, the situation is particularly acute for minorities who must overcome the vestiges of racial discrimination. It is unfortunate -- but not

^{18/} See SBAC Report at pp. 7 to 17.

^{19/} Notice at paragraph 75.

^{20/} SBAC Report at 4-5.

surprising in light of historical record -- that minorities are more underrepresented in the communications industry than are women.^{21/} To treat all of the Designated Entities equally under the circumstances would not truly create meaningful opportunities for minority applicants.

14. The broadband PCS allocation provides a case in point. The Commission is proposing to set aside one 20 MHz frequency block and one 10 MHz frequency block nationwide for Designated Entities.^{22/} The Commission must be concerned that these two licenses will be garnered solely by women, small businesses and rural telephone companies if these groups are granted preferences equal to those accorded minorities. The figures cited by the SBAC indicate that there were 4,112,787 women-owned proprietorships, partnerships and subchapter S corporations in 1987, and that small businesses as a whole constitute a significant and growing element of the communications sector.^{23/} In addition, rural telephone companies enjoyed preferential treatment in the cellular service by virtue of their eligibility for the Block B licenses that were set aside for wireline companies, and in many instances have enjoyed substantial financial returns as a result. Under these

^{21/} Id. at 3-4. This may be attributable to the fact that many of the principal telecommunications licenses in the U.S. were assigned during periods of overt discrimination against racial minorities.

^{22/} Notice at paragraph 121.

^{23/} SBAC Report at pp. 3, 5.

circumstances, the Commission must recognize that treating minorities the same as the other Designated Entities could result in no substantial minority participation.

15. The best solution is for the Commission to adopt an across-the-board requirement that a fixed percentage, perhaps 20%, of all broadband PCS licenses be awarded to minority controlled entities.^{24/} Only with a percentage requirement can the Commission "ensure", as required by the Budget Act, the creation of meaningful opportunities for minorities.^{25/}

**IV. The Commission Must Foster
Strategic Alliances Between Established
Communications Companies and Minority Businesses**

16. The Commission seeks comment on whether preferences accorded to Designated Entities should be limited to the set-aside blocks of broadband PCS spectrum, or rather whether incentives should be extended to the non-set-aside spectrum.^{26/} It is essential for minority group applicants to be able to participate in a substantial fashion in the non-set-aside

^{24/} Mr. Murray will be filing comments in the reconsideration phase of the broadband PCS proceeding recommending that all of the licenses be made available in comparably sized blocks of 10 MHz (or, perhaps, 20 MHz), rather than in the varying sizes proposed in the Second Report and Order in GEN Docket No. 90-314. If this proposal is adopted, the reservation of 20 MHz solely for minority-owned businesses would effect a set-aside of 16 and two-thirds of the licenses for this category.

^{25/} Setting aside a certain percentage of government grants for minority business is a familiar technique that has worked well in other settings.

^{26/} Notice at paragraph 121.

spectrum blocks in order for the Commission to satisfy its Congressional mandate.

17. As has been well stated in the dissenting statement of Commissioner Barrett in the broadband PCS proceeding,^{27/} the one 20 MHz BTA block contemplated for set-aside for Designated Entities in the 1850-1990 MHz band may prove uneconomic in comparison to the non-set-aside blocks in this band that are larger both in terms of allocated bandwidth and geographic service area.^{28/} Similarly, the one 10 MHz BTA allocation proposed for set-aside above 2 GHz is suspect on both technical and economic grounds.^{29/} With these concerns in mind, the Commission must devote serious attention to creating preference mechanisms that will permit minority-owned businesses to emerge as significant participants in the 30 MHz MTA allocations.^{30/}

18. Given the number of substantial companies that have demonstrated an interest in broadband PCS, and the relatively limited number of licenses that will be available in each area, it is unrealistic to assume that the Commission can

^{27/} See Dissenting Statement of Commissioner Andrew C. Barrett in the Second Report and Order in GEN Docket No. 90-314.

^{28/} Barrett Dissent at pp. 5-6.

^{29/} Id. at p. 7.

^{30/} As noted, Mr. Murray intends to participate in the reconsideration phase of GEN Docket No. 90-314 in an effort to reformulate the spectrum block and geographic allocations in a manner that avoids the creation of the "spectrum ghetto" perceived by Commissioner Barrett.

create sufficient financial preferences to allow minority businesses to outbid all comers. The focus, therefore, in the non-set-aside bands should be on the adoption of policies that will encourage major players to form strategic alliances with minority businesses. Mr. Murray has several ideas along these lines that his experience indicates will bear fruit.

19. First, as recommended by the SBAC, the Commission should allow for an exemption to any proposed spectrum caps in a market where a joint venture exists with a minority-owned enterprise.^{31/} For example, existing cellular companies should be able to apply for more than a single 10 Mhz block if they do so in tandem with a minority-controlled business. Of course, standards would have to be adopted to assure that the minority participation was bona fide and meaningful.^{32/}

20. Second, the Commission should adopt a system of financial preferences for non-set-aside spectrum in which applicants receive a bidding credit that would increase proportionately as the extent of their minority participation increases. For example, a 100% minority-owned business might be

^{31/} SBAC Report at p. i.

^{32/} For example, the Commission has adopted a 20% attribution standard to determine whether a party holds a sufficient interest in a cellular license to be subject to the PCS spectrum cap. See Second Report and Order in GEN Docket No. 90-314, at paragraph 107. It would make sense for the Commission to remove the spectrum cap if a cellular operator entered into a strategic alliance in which a minority-controlled business held a 20% interest. The minority interest should, however, be an active and not a passive one.

accorded a bidding credit equal to 20% of the total bid price.^{33/} A strategic alliance owned 50% by minorities would be entitled to one-half the credit (i.e., 10%).^{34/} A program of this nature would create powerful incentives for major industry participants to aggressively seek minority owned businesses as strategic partners.^{35/}

21. Third, the Commission should consider offering procedural benefits to applicants with substantial minority participation. The proposed broadband PCS auction scheme calls for 2562 separate auctions, after which the winning applications will be subject to Commission screening processes and petition to deny procedures. The Commission could adopt a two-tiered processing mechanism in which the first wave of applications processed after each round of auctions would be those of applicants containing substantial minority participation.^{36/} In the context of what promises to be a highly competitive service,

^{33/} Under this scenario, if the winning bid was \$100 million, the minority-owned firm would only be required to pay \$80 million.

^{34/} In order to encourage substantial participation by minorities, eligibility for this credit might be limited to applicants with 10% or greater minority ownership.

^{35/} This program would prove most beneficial to the major industry participant if the alliance was with a minority business financially capable of meeting its pro-rated share of operating expenses. Consequently, it would foster agreements with minority businesses capable of participating in a meaningful fashion in the enterprise.

^{36/} The short-form application would require an indication of the percentage of minority ownership so that those qualified for the expedited processing treatment would be readily identifiable.

a procedural headstart of this nature could be significant, and thus would provide meaningful impetus for serious contenders to form strategic alliances with minority businesses.

**V. A Broad Range of Preference
Mechanisms Must Be Adopted Along
With Appropriate Safeguards**

22. The Notice outlines a variety of preference mechanisms that are under consideration by the Commission, including the use of spectrum set-asides, adopting preferred payment terms, implementing a system of tax certificates, distress sale policies, and subjecting minority businesses to relaxed financial qualifications showings. The Commission need not, however, choose from among these items. Rather, the Commission should adopt the full array of preference mechanisms, thereby creating a variety of differing opportunities.

23. The SBAC Report contains specific findings indicating that existing investment policies and practices, concentration of telecommunications ownership, and undercapitalization pose a serious risk that competitive bidding for spectrum will unduly burden, and in some cases foreclose, entry opportunities for Designated Entities.^{37/} In light of the explicit Congressional directive to the Commission to create opportunities for these categories of applicants, the Commission should take an expansive approach to the preference issue.

^{37/} SBAC Report at p. 2.

24. Mr. Murray is sensitive, however, to the need for safeguards to avoid situations in which the participation of minority-controlled businesses is a sham designed to accord non-qualifying entities the benefits of the preferences without the meaningful long-term participation of the minority participant in the day-to-day operations of the business. Mr. Murray recommends, in all instances in which an applicant is partially owned by minority group members and is claiming preference benefits, that the operative agreements establishing the relationship between the parties to the application be filed with the Commission as part of the long-form application.^{38/} This relatively simple requirement would encourage applicants to enter into arrangements that call for the substantial long-term participation of the minority group member in order to avoid challenges to the eligibility of the applicant for the requested preference.

25. Mr. Murray is not in favor of outright prohibitions on the alienation of Designated Entities licenses. The Notice expresses proper concern that an outright prohibition on transfer, even for a limited time, may block or delay efficient market transactions needed to attract capital, reduce costs, or otherwise put in place owners capable of bringing

^{38/} This is not an unfamiliar requirement. In the context of cellular lottery applications, the Commission required the filing of complete executed copies of general partnership agreements so that the Commission could properly identify the real parties in interest behind each application.

service to the public expeditiously.^{39/} If anything, the far-reaching debate over the amount of bandwidth and the amount of geography that should be accorded to a PCS licensee indicates that the optimal configuration of PCS systems is not easily determined. The Commission should strenuously avoid alienation restrictions that would prevent post-auction transactions that could serve to correct or adjust spectrum allocations.^{40/}

26. On balance, Mr. Murray concludes that the Commission should adopt a simple rule requiring any applicant who qualified for a preference to make an anti-trafficking and anti-unjust enrichment showing whenever a transaction is undertaken that would serve to cause the license to be held by a successor that would not have been eligible for the previously granted preference. The Commission may view these showings on an ad hoc basis and disapprove transactions that reflect an abuse of the Commission's preference processes.^{41/}

^{39/} Notice at paragraph 84.

^{40/} For example, a minority controlled business could garner a license in a smaller market area, and decide for legitimate business reasons to form a strategic alliance with a neighbor in a larger adjoining market. The Commission should encourage transactions of this nature, even if the participation of the minority in the overall enterprise was diluted as a result of the merger.

^{41/} Although conceptually a system of financial disincentives to prevent sellers from realizing any windfall profit from the premature sale of an interest in a Designated Entity license has appeal, Mr. Murray is concerned that an approach of this nature would be difficult to administer.

VI. Conclusion

27. The foregoing premises having been duly considered, George E. Murray respectfully requests that the Commission adopt rules and procedures in this competitive bidding docket that are consistent with the aforementioned comments.

Respectfully submitted,

GEORGE E. MURRAY

By: Carl W. Northrop / *CAW*
Carl W. Northrop

His Attorney

Bryan Cave
Suite 700
700 13th Street, N.W.
Washington, DC 20005
(202) 508-6000

November 10, 1993

CERTIFICATE OF SERVICE

I, Tana Christine Maples, hereby certify that I have this 10th day of November, 1993, caused copies of the foregoing **Comments Of George E. Murray** to be delivered by hand, courier charges prepaid, to the following:

James H. Quello, Acting Chairman
Stop Code 0106
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Andrew C. Barrett, Commissioner
Stop Code 0103
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Ervin S. Duggan, Commissioner
Stop Code 0104
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Robert M. Pepper
Stop Code 1000
Office of Plans and Policy
Federal Communications Commission
1919 M Street, N.W., Room 822
Washington, DC 20554


Tana Christine Maples